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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

11 UNITED STATES OF AMERICA

Case No. CR-10-00434-RMW

12 Plaintiff,

ANCILLARY PROCEEDING

13 v.
14 N'GUESSAN YAO AND MICHAEL BARRY
15 SHOR,
16 Defendants.

**ORDER PERMITTING PETITIONER
TO FILE AN AFFIDAVIT PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 56(d)**

17 REPUBLIC OF THE COTE D'IVOIRE,

18 Petitioner.

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21 This ancillary proceeding relates to \$3,923,030 (“the funds”) which this court forfeited from
22 defendants N'Guessan Yao (“Yao”) and Michael Barry Shor (“Shor”) in sentencing them for
23 conspiracy to export arms illegally. Petitioner, the Republic of the Cote d'Ivoire, asserts ownership
24 of the funds and petitions the court pursuant to 21 U.S.C. § 853(n)(6) for a determination of lack of
25 forfeitability of its ownership interest. The United States moves for summary judgment that the
26 Cote d'Ivoire possesses no ownership interest in the funds under § 853(n)(6) and seeks a final order
27 of forfeiture of the funds to the United States. Petitioner cross-moves for summary judgment that it
28 is the sole owner of the funds and seeks an order granting ownership of the funds to the Cote

1 d'Ivoire. Before the court feels comfortable issuing its order on the cross-motions, the court must
2 address a discovery issue brought to the court's attention at the hearing.

3 At the hearing, Cote d'Ivoire argued that, if the government's motion is treated as a motion
4 for summary judgment, it is entitled to full discovery to oppose the motion.¹ The government
5 contends that its motion is and has always been mutually understood by the parties to be a motion
6 for summary judgment. According to the government, the parties agreed that no discovery was
7 required prior to filing the present motions.

8 First, the court agrees with the government that this is a motion for summary judgment and
9 not a Rule 12(b)(6) motion. The joint case management statement and case management order in
10 the case, which were entered prior to the government's filing of its motion, both state that the
11 government will file a motion for "partial summary judgment." See Dkt Nos. 137, 141.

12 The joint case management statement from December 12, 2012 states that the United States
13 will:

14 file its own motion for partial summary judgment requesting a ruling that
15 21 U.S.C. § 853(n)(6) limits the issues in this ancillary proceeding. The
16 only issue in an ancillary proceeding is whether petitioner Cote d'Ivoire
17 can establish ownership of the forfeited funds by providing that a
18 preponderance of the evidence establishes that petitioner either (1) has a
superior interest in the forfeited funds . . . or (2) that it is a *bona fide*
purchaser for value of the forfeited asset . . .

19 Dkt. No. 137 at 12. The court finds it reasonable to interpret the government's statement to mean
20 that, once the court rules on the government's motion for partial summary judgment to limit the
21 issues in this ancillary proceeding to ownership, petitioner will be entitled to full discovery with
respect to the ownership issue.

22 Rather than filing a partial summary judgment limiting the issues, the government instead
23 filed a full motion for summary judgment on the ownership issue. The Cote d'Ivoire stated in the
24 joint case management statement that it anticipated "the depositions of several individuals including
25 [Shor], [Yao] and several ICE agents and undercover agents" and "possible discovery motions for a
26 court ruling on the disclosure of documents filed under seal should the government refuse to

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28 ¹ In its reply brief in support of its cross motion, Cote d'Ivoire argued that because no discovery had been conducted, the court should elect to treat this as a motion to dismiss under Federal Rule of Civil Procedure 12(b). Pet'r's Reply 4, Dkt. No. 151.

1 disclose those documents to petitioner.” Dkt. No. 137 at 13-14. The Cote d’Ivoire also indicated
2 that it might seek “all wiretaps, notes and [the] entire discovery file from the criminal case .” *Id.* at
3 13. In view of the evidence that the Ivorian government participated in the illegal transaction and
4 that the Ivorian Minister of Defense had knowledge of the illegal transaction, the court is highly
5 skeptical that the discovery the Cote d’Ivoire seeks could help it defeat the government’s motion for
6 summary judgment. However, in an abundance of caution the court will permit the Cote d’Ivoire to
7 file an affidavit under Federal Rule of Civil Procedure 56(d) explaining why it cannot show facts
8 essential to support its opposition to the government’s motion, and setting forth what facts it could
9 obtain that could establish that the transaction was unauthorized by the Ivorian government. The
10 court orders the Cote d’Ivoire to file the Rule 56(d) affidavit on or before September 5, 2013. If the
11 Cote d’Ivoire fails to file the affidavit, the court will issue an order on the cross-motions based on
12 the evidence presently before it.

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14 **IT IS SO ORDERED.**

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17 Dated: August 15, 2013

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RONALD M. WHYTE
United States District Judge